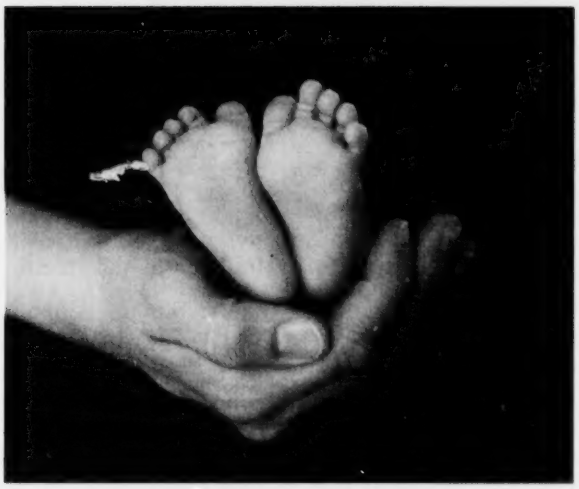
Protection of Vulnerable Newborn Children:

A Holistic Approach



Ombudsman and Child and Youth Advocate Report

Bernard Richard
New Brunswick Ombudsman and Child and Youth Advocate
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A Report of the New Brunswick Ombdusman and Youth and Youth Advocate

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Published by:
Office of the Ombudsman & Child and Youth Advocate
Province of New Brunswick
P.O. Box 6000
Fredericton, New Brunswick
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Canada

September 2009

Printed in New Brunswick

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I. BACKGROUND

Purpose

On July 24, 2009, the Child Death Review Committee (the "Committee") submitted its report regarding the death of a newborn child who had been known to the child protection system. The parents of the child in question were in regular contact with the Department of Social Development ("Social Development"). Eventually, it was discovered that the mother had given birth. The RCMP became involved and criminal charges were brought against both the mother and the father of the newborn. The Committee's report contained only one recommendation:

> "That the Department of Social Development explore what actions would or should be available to the Minister when it is suspected that a person, especially one known to the Department, is pregnant or appears to be hiding a pregnancy and that this action may prove harmful either to themselves or the baby once delivered."

The Department of Social Development has requested a submission from the Child and Youth Advocate regarding this recommendation.

II. ANALYSIS

(a) Academic Literature

The killing of newborn infants is not a new phenomenon, yet modern society is still struggling with understanding the causes and the ideal way to address it.

Several studies have revealed that there are remarkable similarities among the women who commit infanticide. These women are usually young, commonly in their teens or early twenties, are unmarried, frequently not involved in a relationship with the father, and generally live with their parents. They are socially isolated, have little or no financial independence and are emotionally immature. They are of all ethnicities and come from varying social backgrounds.[1]

The denial of a pregnancy to others and sometimes even to oneself, is a common feature with infanticide. The degree of denial of the pregnancy can vary. In women who cognitively realize that they are pregnant but do not experience the normal emotions associated with pregnancy and do not prepare for it, it is called affective denial. In women who pervasively deny pregnancy and do not intellectually acknowledge it to themselves, it is it called pervasive denial.[2] Social factors may contribute to the denial. These factors include social isolation, fear of pregnancy, and cultures which find sexual relations outside of marriage unacceptable. Women experiencing this denial are generally lacking a positive

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[1] National Abandoned Infants Assistance Resource Centre. Discarded infants and neonaticide: a review of the literature. Berkeley: University of California; 2004.; Spinelli MG. A systematic investigation of 16 cases of neonaticide. Am J Psychiatry 2001; 158:811-3. Friedman SH. Characteristics of Women Who Deny or Conceal Pregnancy. Psychosomatics 48;2, March-April 2007.

[2] Miller LJ. "Denial of pregnancy." In Infanticide: Psychosocial and legal perspectives on mothers who kill (pp. 81 – 104). (2003: Washington, D.C., American Psychiatric Publishing, Inc).

support system and their family may participate in the denial of the pregnancy.[3]

In summary, women who commit infanticide are a subgroup of the sexually active population whose social and economic situation are such that having and raising children would be exceptionally difficult.[4] Based on the research done thus far, criminally prosecuting women for these acts will have little deterrent effect. One researcher suggests that the answer to preventing infanticide lies in "identifying and remedying girls' vulnerability long before they become pregnant".[5] In other words while the public sanctioning of the prevention of infanticide through criminal code provisions may be an appropriate and necessary measure, society cannot rely on the *Criminal Code* provisions in this case as a realistic deterrent or preventive measure.

(b) Applicable Law

1. *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.* [6]

In this case, the Manitoba Court of Queen's Bench ordered that D.F.G. be placed in custody of the Director of Child and Family Services (the "Director") and be detained at a treatment centre until the birth of her child. She was also ordered to follow treatment as prescribed by the Director. D.F.G. was addicted to glue sniffing and had already given birth to two previous infants who suffered from the effects of her addiction. She was now pregnant with her fourth child and the Director sought to protect that unborn child. At the time that the Supreme Court released its decision, D.F.G. had voluntarily undertaken treatment and given birth to a healthy child.

The majority decision written by Justice McLachlin considered whether the Supreme Court had authority under common law principles to order that a pregnant woman be detained and/or undergo treatment. Two areas of the common law were considered: tort law and *parens patriae* jurisdiction, also called wardship jurisdiction. In both cases the Supreme Court found that the change to the common law required to make this type of order is of such "magnitude, consequence and policy" that it exceeds the "proper incremental law-making powers of the courts" and that such a change is a task more appropriate for the legislature.

Under common law, legal personhood accrues at birth and any interest or right the fetus may have remains "inchoate and incomplete" until after a successful birth. The order requested by the director would require a change to this common law principle. It would also require that tort law be changed to create a cause of action for lifestyle choices of the pregnant mother which might affect others and an extension of injunctive relief in civil cases to the detention of another person. The Supreme Court found that the law is clear that courts do not have *parens patriae* or wardship jurisdiction over unborn children and that the legislature is better positioned to weigh the interests involved and arrive at a principled and minimally intrusive solution.

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[3] National Abandoned Infants Assistance Resource Centre. Discarded infants and neonaticide: a review of the literature. Berkeley: University of California.

[4] Lee ACW, Li CH, Kwong NS, So Kt. Hong Kong Med J 2006; 12:61-4.

[5] Michelle Oberman, Mothers Who Kill: Coming to Terms with Modern American Infanticide, 34 American Criminal Law Review 1 (Fall 1996) which studied 47 neonaticide cases reported in the media between 1988-1995 at 73.

[6] [1997] 3 S.C.R. 925.

The minority decision, written by Justice Major and supported by Justice Sopinka, disagrees that courts cannot make changes to the law to allow for such an order as is being considered in this case. Justice Major finds that such an order can be made by a court in exercising its *parens patriae* jurisdiction when there is a reasonable probability of the conduct of a pregnant woman causing serious and irreparable harm to the fetus within her. He finds that the "born alive" rule, that a fetus has to be born alive before any legal rights of personhood can accrue should be set aside because its purpose was based on a time when it could not be determined whether the unborn child was alive until birth. Present medical technology renders the rule outdated and indefensible. Applying the *parens patriae* jurisdiction to the unborn can only be possible where a woman has decided to carry a child to term as opposed to terminating the pregnancy; where there is proof that irreparable harm will be caused; where the remedy is least intrusive; and where the process is procedurally fair. Among other authorities, the minority cites the UN Declaration of the Rights of the Child and its preamble which states "the child...needs special safeguards and care, including appropriate legal protection, **before** as well as after birth..." [emphasis added]. The minority appears to envision applying the *parens patriae* jurisdiction in this manner only in cases where the unborn child requires protection from a mother who abuses substances.

2. Criminal Code of Canada

The *Criminal Code* contains provisions against abandoning a child (section 218), killing an unborn child in the act of birth (section 238), concealing the body of a child in order to conceal its birth (section 243) and neglecting to obtain assistance with child birth with the intent to conceal the birth (section 242). It also contains what is known as an infanticide provision which limits imprisonment to five years if a woman's mind is disturbed by the effects of lactation or birth at the time that infanticide is committed. Only sections 242 and 233 apply to female persons. Section 223 states that a child becomes a human being when it has "completely proceeded, in a living state, from the body of its mother."

(c) Other Jurisdictions

In canvassing the measures taken by other jurisdictions in responding to this problem, including all Canadian and several European and American jurisdictions, no jurisdiction was found where measures are taken to detain pregnant women or regulate any aspect of their behaviour.

1. Canada

The child welfare agencies in other Canadian jurisdictions respond in relatively similar ways. They offer services to pregnant women who may be considered to be more likely than others to take actions which will put their unborn child at risk. If these services are refused by the expectant mother, hospitals will be asked to notify child welfare agencies when the mother presents for birth. This is commonly called a "birth alert". This approach is taken in New Brunswick and was taken in the present case. As in New Brunswick, child welfare agencies in other provinces do not have authority to take further action until the child is born. This is in contrast to the United Kingdom where child welfare agencies have a policy that allows child protection plans to be made regarding unborn children. However, these plans cannot allow for the detainment of pregnant women.

Some government officials in other jurisdictions noted that hospital staff is very reliable in reporting to child protection authorities any pregnant woman who presents at the hospital and who had not

received prenatal care. It is notable that in Manitoba, such notification is automatically required by doctors who are treating any pregnant women under the age of 18.[7]

New Brunswick is different from several other Canadian jurisdictions[8] in including "unborn child" as part of the definition of "child" in the *Family Services Act.*[9] However, Social Development does not appear to have any programs which carry out this mandate with the possible exception of Birth Parent Services. *Regulation 81-132*, pursuant to the *Family Services Act,* narrows the definition of child from that found in the *Act*, by excluding the phrase 'unborn child' from the definition of "child" for the purpose of Part III, Child Protection. This inconsistency in definitions between the *Act* and the *Regulation* leads to confusion and may require resolution.

2. United States of America

Most American jurisdictions have enacted what is commonly known as "Safe Haven" legislation. These provisions allow newborns to be safely abandoned in designated locations and will be discussed in more detail below. Non-profit organizations in two American jurisdictions also have developed programs which intend to prevent the need for newborn abandonment legislation.

i) Nebraska Children's Home Society

According to the President of the Adoption Council of Canada,[10] an adoption agency in Nebraska, Nebraska's Children Home Society (N.C.H.S.), has implemented another solution which should be considered as an option to the issue of baby abandonment and infanticide. The Nebraska program is a statewide, 24-hour, 365 days a year hotline for unplanned pregnancies answered by a N.C.H.S. social worker. This state-wide agency can have a supportive caseworker visit the mother quickly anywhere in Nebraska. The worker will help the mother get to the hospital or, if already there, offer her the opportunity to provide the infant with safe, confidential care in a temporary, safe, "cradle care" home. The intent is to provide the mother with time to step back and evaluate her situation while keeping her baby safe. When she is ready, a more permanent plan, either parenting or adoption, can be discussed. The mother's identity remains confidential and her rights to the child remain intact. According to N.C.H.S., the program has been more successful than Safe Haven legislation in other states.

The N.C.H.S. program recognizes the importance of education in the prevention of newborn killing and abandonment. N.C.H.S. developed both a middle school and a high school curriculum to heighten awareness of young people experiencing unplanned pregnancies; the hotline number is posted in colleges across the state; crisis pregnancy centers are aware of the program; information was supplied to doctors and hospitals for their high risk patients; and a billboard campaign publicized the hotline number.

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[7] Telephone communication with Jane Cowell of BC Ministry of Child and Family Development and Michelle Hickley of Manitoba Department of Family Services and Housing.

[8] British Columbia, Alberta, Manitoba, Ontario, North West Territories, Yukon, Nova Scotia, PEI, Newfoundland & Labrador, unsure of Saskatchewan & Quebec.

[9] S.N.B. 1980, c. F-2.2.

[10] Sandra Scarth, President Adoption Council of Canada; in email sent to our office, dated September 2, 2009, [Adoption Council of Canada].

N.C.H.S. believes that they have been successful in reaching high risk pregnant women who conceal their pregnancies. They state that, out of a total of 600 calls annually since 2000, they received 53 cases which they considered extremely high risk where the mother had denied the pregnancy and there was genuine concern for the safety of the baby. Most of the mothers were in panic mode. N.C.H.S. caseworkers went to them, offered support, education on the mother's options and rights, and the rights of the father.

Of the 53 cases, 38 moms chose to immediately put the infant into cradle care, the N.C.H.S. version of safe haven. Later, sometimes days later, moms returned to discuss plans for their child. The interim when baby is safe and the mother has time to herself is extremely important. After discussing the options with N.C.H.S. staff, 12 mothers decided to parent while the other 26 made an adoptive plan. Of the 15 mothers that initially chose not to use cradle care, 7 parented while 8 mothers made an adoptive plan. When a parenting plan was made, they were supplied with diapers, formula, clothing and other needs to help them with their child. The agency continues to make their services available to them. The overall goal is to insure the safety of the child and allow the mother the time to evaluate her situation.[11]

ii) Project Cuddle

California is home to a non-profit organization named Project Cuddle which claims it is ready to serve the whole of the United States as well as Canada. Project Cuddle has been operating for 13 years through a hotline. Women who are concealing a pregnancy can call 24 hours a day, 7 days a week and confidentiality is assured. Their website claims that they work with frightened girls or women to help them find safe, legal options so that baby abandonment is avoided. They also state that they can help these women to complete their education and obtain employment.[12]

III. OPTIONS

There are no simple solutions to the problem of infanticide and infant abandonment. Social isolation and denial of a pregnancy prevent these women from seeking help. In such circumstances, it is difficult for care providers and other professionals to become aware of these at-risk pregnant mothers. Often child protection agencies have no knowledge of these situations until these women present to a hospital or an infant's body is found. As a result, it is presumed that many infanticides go undetected.[13]

However, many possible preventative measures, specifically in the areas of legislation, services, education and research, may assist social workers and other professionals identify at-risk pregnant women and perhaps increase the likelihood of preventing infanticide.

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[11] "Nebraska 'Safe Haven' Program"; Bob Brandt, Executive Director, Nebraska Children's Home Society, a licensed private, non-sectarian, non-profit child agency focused on promoting adoption and offering support to pregnant mothers, including reaching high risk mothers in denial; copy of undated article sent to our office by Sandra Scarth, President of Adoption Council of Canada, via email dated September 2, 2009.

[12] www.projectcuddle.org

[13] National Abandoned Infants Assistance Resource Centre. Discarded infants and neonaticide: a review of the literature. Berkeley: University of California, September 2004.

(a) Legislation

1. Safe Haven Legislation

Safe Haven legislation exists in several jurisdictions including the United States, Germany, Japan, Italy, Pakistan, Hungary and Austria. It allows parents to leave their newborn at a 'safe haven' such as a church or hospital, no questions asked. In the United States, the legislation varies from state to state with respect to with whom the child can be left, the level of anonymity and the age of the child, among other factors.

Currently, there is no Safe Haven legislation in Canada. In New Brunswick, *An Act to Amend the Family Services Act* was introduced in the legislature by the leader of the opposition on May 13, 2009. The Bill was referred to the Standing Committee on Law Amendments for future study. It consists of the following sections:

> *1 Section 1 of the Family Services Act, chapter F-2.2 of the Acts of New Brunswick, 1980, is amended by adding the following definition in alphabetical order:*
>
> > *"safe haven" means that parents of children 72 hours old or younger are able to give possession of their child away to an emergency room nurse without fear of prosecution provided the child has no signs of abuse or neglect;*
>
> *2 Section 3 of the Act is amended by adding after subsection (3) the following:*
>
> > *3(4) The Minister and any person authorized under paragraph (1)(b) to exercise any authority, power, duty or function conferred upon the Minister shall create and implement a safe haven policy.*
>
> *3 This Act comes into force on a day to be fixed by proclamation.*

On the surface, Safe Haven legislation, like the title itself conjures up the belief that it will save and protect children from abandonment and death. However, upon closer scrutiny, while its goal may be noble, it may not actually solve the problem it is meant to address and it may actually be detrimental to children in some circumstances.

There are four areas of concern raised by the legalization of child abandonment. The first issue is that a Safe Haven law may conflict with provincial legislation and policies regarding adoption. There is also a concern that such a law may encourage women to conceal pregnancies and then abandon infants who otherwise would have been placed for adoption through established legal procedures or would have been raised by biological parents or relatives.[14] According to their website[15], the American National Conference of State Legislatures ("N.C.S.L.") is a "bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths and territories." The N.C.S.L. raises the concern that

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[14] "Unintended Consequences: 'Safe Haven' laws are causing problems, not solving them", Evan B. Donaldson Adoption Institute (New York); published March 2003, New York, N.Y. [Donaldson Adoption Institute].

[15] http://www.ncsl.org/

Safe Haven laws may conflict with the biological parents' rights to due process in proceedings of the termination of their parental rights.[16] A mother who abandons her infant should understand the legal consequence of doing so where her parental rights are concerned. The province will want to carefully examine any existing termination of parental rights provisions to avoid conflicts in the drafting of a Safe Haven law.

In addition, children's fundamental rights to their genealogical, medical, and health histories, as well as information relating to identity, are forfeited when they are abandoned. A Canadian organization which is strongly opposed to legislated safe havens is the Adoption Council of Canada ("Adoption Council"). The Adoption Council "takes a strong position that Canada... has implemented the United Nations Convention on the Rights of the Child and that Convention says that states should assure the child his/her identity." Safe Haven legislation would deny the child this basic right. The Adoption Council raises an important point when they state that "[Safe Haven legislation] is particularly troubling for Aboriginal children who could also be denied their right to educational and other benefits as well as losing the connection to their heritage."[17] The same potential loss of rights presents itself in the case of children with minority language rights.

In the United States, adoption advocates have similar concerns. Adoption and other child welfare experts also point out that the legislation may not be necessary because most states and provinces will not prosecute women who give birth and relinquish their newborns in the hospital. Additionally, every state allows women to voluntarily relinquish their infants for adoption.[18]

A second issue relates to the impact on parental rights. Safe Haven legislation may create the opportunity for "upset family members, disgruntled boyfriends, or others who have no legal rights", to abandon babies without the birth mothers' consent.[19] Any legislation should be crafted to protect a mother's rights, if someone other than a mother dropped a child off. If anonymity will be guaranteed, it must ensure that the person has the authority to give up a newborn.[20]

Paternal rights are also involved. A Safe Haven law may deprive biological fathers of their legal right to care for their children when they have "the desire and personal resources to do so".[21] In most of the United States, according to one source, the birth father retains all parental rights if he was unaware that the child's mother relinquished control of the child.[22] However, the source does not specify how this is accomplished.

A few states require "a check of the putative father registry and include provisions to contact the putative father, but most do not contain provisions to address notification of fathers who may not be aware of the child's birth." Utah's legislation addresses this concern by requiring a search of the "confidential registry for unmarried biological parents and requiring that notice be sent to each

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[16] "Update: Safe Havens for abandoned infants"; National Conference of State Legislatures (U.S.A.); October 23, 2003. Article provided by the Adoption Council of Canada [State Legislatures].

[17] Adoption Council of Canada, *supra* note 10.

[18] State Legislatures, *supra* note 16.

[19] Donaldson Adoption Institute, *supra* note 14.

[20] Pat Gallagher-Jette, a Saint John lawyer who represents children in child protection matters and supports the Bill; "Support grows for proposed N.B. 'safe haven' law to protect newborns"; online CBC News May 15, 2009.

[21] Donaldson Adoption Institute, *supra* note 14.

[22] "Safe-Haven Laws Help Protect Newborns" Lawyer.com; online; February 2008.

potential father identified in the registry."[23]

A third issue is that "Safe Haven" laws have an underlying social message that deserting one's children is acceptable.[24] Legalizing the abandonment of a child does not support our province's social policies. Condoning the abandonment of infants intuitively goes against society's desire to unfailingly value the lives of our children.

The fourth issue regarding Safe Haven legislation is that there is little research to demonstrate that it actually results in saving the lives of infants. In Canada, no statistics on the number of unsafe abandonment of infants are formally collected. The Adoption Council provided our office with an article published by the N.C.S.L. The N.C.S.L. states that "safe haven" laws "continue to have a limited effect" and that "unlawful abandonment continues to be a problem" even in states which have enacted such laws. New Jersey and Texas did report a decrease in unsafe abandonment, particularly following an awareness campaign of the option, but unsafe abandonments are still occurring in Illinois, Louisiana, California, Colorado and Michigan. Michigan and Colorado also have reports of mothers attempting to regain custody of their babies after they had abandoned them illegally.[25]

Dawn Geras of the Save Abandoned Babies Foundation in Illinois stated that 32 babies have been brought in under the safe-haven option since her state passed legislation in 2001. There have also been 46 'illegal abandonments' in the state since the law has passed, but "that number appears to be dropping."[26] However, many policymakers are concerned that these laws may only encourage parental irresponsibility. Given that so little is known about the women who abandon their babies, "there is no proof that the legislation will discourage mothers from leaving their infants in unsafe places..."[27]

The Adoption Council believes that a young woman who has denied her pregnancy and who is in a panic and terrified when the birth is imminent, is"...in no condition to make such life-changing decisions as to whether to call for help or to abandon the child."[28] The Adoption Council adds, "...we do not believe that [Safe Haven] legislation will accomplish what it sets out to do."

Should Safe Haven legislation move forward, it would need to adequately address the issues of parental and children's rights and any promotion of it should include all options available to pregnant mothers in crisis.

One final observation relating to Safe Haven legislation is its potential for conflict with federal statutes, in particular the *Criminal Code*. Section 218 of the *Criminal Code* states as follows:

> *Part VIII – Offences Against the Person and Reputation*
>
> *Duties Tending to Preservation of Life*
>
> ***Abandoning child*** ***218.*** *Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured,*
>
> *(a) is guilty of an indictable offence and liable to imprisonment for a term not*

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[23] State Legislatures, *supra* note 16.
[24] Donaldson Adoption Institute, *supra* note 14.
[25] State Legislatures, *supra* note 16.
[26] "Sask. policy like safe-haven law", Angela Hall, Leader-Post, May 25, 2007 [Sask. Policy].
[27] State Legislatures, *supra* note 16.
[28] Adoption Council of Canada, *supra* note 10.

exceeding five years; or

(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.[29]

Any Safe Haven legislation drafted by a provincial jurisdiction in Canada runs the risk of being struck down as *ultra vires* the province as an encroachment upon the federal government's exclusive jurisdiction in relation to criminal law.

2. Detainment of Pregnant Women

Deserving of discussion are measures designed to protect unborn children by requiring mothers who may harm them to receive particular treatment or reside somewhere until the birth of the child. As discussed above, the Supreme Court of Canada found that such a law would need to be enacted by the legislature. The Supreme Court left untouched the issue of whether such a law would be a violation of the *Canadian Charter of Rights and Freedoms*, though that is a possibility. Further, the Royal Commission on new Reproductive Technologies made recommendations which rejected state-sanctioned intervention in pregnancy and birth in its report released in December 1993 and titled *Proceed With Care*.[30]

Any measure which interfered with the liberty of pregnant women would represent a marked departure from present law. Such a shift would elevate the rights of unborn persons over those of another person, the mother, and would permit deprivations of liberty of women. Our society only sanctions such deprivations under very serious circumstances, such as breaches of the *Criminal Code* or the presence of a danger to oneself and others as a result of mental illness. Many New Brunswickers would argue that the protection of unborn children from mothers who intend to harm their child at birth by abandonment or by committing infanticide is a pressing social concern and that the deprivation of liberty which may be required to protect the child – for instance mandatory counselling, testing to confirm pregnancy, or even more intrusive monitoring of the mother's health and whereabouts as a result of judicial ordinance – may be reasonable and justified infringements upon a mother's liberty in a free and democratic society.

While the majority decision of the Supreme Court of Canada in the *Winnipeg* case, discussed above, confirms that Courts do not have inherent *parens patriae* jurisdiction over unborn children, our analysis above of the recent legislative proposal for a Safe Haven law in New Brunswick suggests that the Legislative response to this situation must be more discerning. One possible response, which would be compatible with the majority and minority opinion in *Winnipeg* and which would be responsive to the democratic support for legislative action, would be to simply confirm the Superior court's *parens patriae* jurisdiction over the unborn in New Brunswick. This might be done through amendments to the *Judicature Act* or through a separate legislative enactment. This approach would be consistent with New Brunswick's existing legislative choice under the *Family Services Act* which includes unborn children in the definition of child. It would also afford the greatest protection possible to the liberty interests of

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[29] R.S.C., 1985, c. C-46, s. 218; 2005, c. 32, s. 12.

[30] Canada, Royal Commission on new Reproductive Technologies, *Proceed With Care: Final Report of the royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services, 1993).

expectant mothers in the province. Where individual rights of persons clash with one another, courts and not legislatures, are most able to balance the interests at stake and arrive at just solutions. The issue need not be confused with legislative recognition of foetal rights generally as the provisions could be limited and invoked only where a substantial risk of significant harm or death to the unborn child is demonstrated. Liberty interests of the mother could be protected also through carefully crafted provisions limiting the scope of protective orders issued, which need not extend so far as any prolonged or forcible detainment.

Social Development interventions may be more effective and may save an infant's life if a judicial protection order was available, if only to confirm a pregnancy and offer counselling. Most often young mothers exercising these options are secluded, isolated, and see no other options. In some cases they may also be unduly influenced by a partner or father of the child already harbouring a criminal intent. In both cases, the state has every right and interest to intercede in favour of protecting the child, through measures such as those proposed. What is required is a balanced and caring approach respectful of a mother's liberty and her child's life.

(b) Services

Of the last three high profile cases of infant death in New Brunswick, two of the mothers were 19, while the age of the other mother is unknown. A brief scan of media reports from across the country over the past several years indicates that while this is not exclusively a teen pregnancy issue, teenage mothers are participants in baby abandonment and infanticide.

The Department of Social Development has launched the Youth at Risk Project. Youth at Risk targets those who are involved in a pregnancy, either the pregnant woman or biological father. The details of the services provided under that project are not yet known to the Child and Youth Advocate. It may be appropriate to include under that model, more services to young mothers such as seen in the Nebraska model.

The Nebraska model has many aspects which would prove useful in preventing newborn killing and abandonment. Its program of mobilizing resources to assist those who have concealed their pregnancies to prevent infant abandonment while allowing them time to consider their options is an ideal response when these women are brave enough to come forward.

The Department of Social Development could provide a counsellor trained to assist women who are concealing their pregnancy in order to help the expectant mother recognize her pregnancy and make plans for her newborn. This counsellor could be called upon by other social workers in situations such as the present case.

Any services which aid young mothers would be helpful in demonstrating that support exists for them. Hopefully, this would assist in alleviating some fears around pregnancy. This in turn may contribute to a decrease of denial or concealment of a pregnancy.

(c) Education and Training

Education is an integral preventative measure in combating the issue of child abandonment and infanticide at several points along the pre-conception to postpartum spectrum.

One component of any education plan should include educating teens on the issue. As a result of recommendations 11 and 12 in the Children Come First Report, the Department of Health in conjunction with the Department of Education has developed the Healthy Learners in School program which aims to improve the health, wellness and learning potential of New Brunswick's students by promoting healthy behaviours to be carried into adulthood. This program as well as sexual health education programs should be reviewed to insure that they address the issue of child abandonment by educating youth about sexual health, contraception, pregnancy denial, the danger of a lack of prenatal care and other family planning issues.

Service providers should be educated regarding denial and concealment of pregnancy, should be trained to identify the signs and best approaches for addressing these situations, and should be informed about available resources.

It is important to note that there is a need to improve education and increase awareness of services and policies already available among our target population. Our target audience should not only include at-risk mothers but partners, family members, and friends of at risk mothers as well. One example is the "unwritten" policy not to prosecute a mother who safely abandons her newborn. In a newspaper article published in Saskatchewan in 2007, [31] that province's Justice Minister Frank Quennell said that "the policy in Saskatchewan is not to prosecute a mother who hands over a baby to an appropriate health or social service agency, and so-called 'safe-haven' legislation wouldn't accomplish anything further." It may be helpful to publicize a similar position in New Brunswick.

(d) Research

In order to develop an action plan to resolve this problem, it is important to conduct research in this area to help determine why parents abandon their children or commit infanticide. It is difficult to find a solution to a problem without being confident of the cause. Additional research is necessary to fully understand the issue in order to devise effective preventative measures. Research is especially needed into the efficacy of Safe Haven legislation. Keeping accurate statistics is also important in the evaluation of any program or service that is adopted by the province.

IV. Recommended Action

Any effective solution needs to address the issues which appear to engender the tragedy of newborn abandonment and infanticide: those of women's empowerment and the perception of pregnancy as being an insurmountable predicament because of financial, emotional, or other barriers. As a result, we recommend that the Minister of Social Development take the following actions:

1. **Provide services** to pregnant women and young parents such as a hotline and specialized

[31] Sask. Policy, *supra* note 26.

counsellors. Requiring the most attention are services which target women who may be experiencing pregnancy denial. Project Cuddle in California already operates a hotline program which is available to women in Canada. Developing a similar hotline to serve New Brunswick at-risk mothers may be valuable. Other services would include distribution of free and available contraception, and strengthening support to low-income pregnant women and young parents. Support and help should be in place for the women who abandon newborns or have been in pregnancy denial as these mothers may have mental health or addiction issues[32].

2. **Educate** youth on family planning issues including contraception, the dangers of a lack of prenatal care, baby abandonment as well as training service providers on identifying and treating the denial of a pregnancy. This should be implemented in partnership with the Department of Education.

3. **Research** the causes of infant abandonment. Since the issue seems closely tied with the social situation of women, this could be performed in conjunction with the Advisory Council on the Status of Women. Research should also be done on the effectiveness of Safe Haven legislation before such legislation is considered further.

4. **Implement policy** which can assist social workers in determining the appropriate steps to take when encountering a woman who may be at risk of harming her unborn child. This policy would require that the pregnant woman be contacted by a counsellor who is trained to assist women in pregnancy denial and be given the number to the hotline. It should also address the involvement of health professionals and hospitals.

5. **Review** the terms of reference of the Child Death Review Committee to determine if its objectives are still desired and, if so, provide the committee with the resources or other assistance required to carry out those objectives.

6. **Legislate** to restore to the superior courts the necessary jurisdiction to protect unborn children from serious harm or death in appropriate circumstances.

V. Conclusion

The discovery of the death of a child is always shocking and upsetting for a community. Even more disconcerting is when authorities are involved before the death occurs and are unable to intervene effectively. While Safe Haven legislation represents good intentions, there is no concrete evidence that it prevents infanticide. If Safe Haven legislation is enacted, it should form part of a larger effort to reach at-risk pregnant teenagers and women and should be accompanied by measures to ensure its effectiveness such as signs displaying designated safe havens.

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[32] Sharon Amirault, executive director of First Steps, a group that provides transitional housing and support services to pregnant teens and deals with desperate moms every day; "Support grows for proposed N.B. 'safe haven' law to protect newborns", online CBC News May 15, 2009.

Rather than relying solely on legislation to address the difficult dilemma of abandoned newborn infants, this paper presents several additional recommendations. There is no single solution to the problem of infanticide; however, a response which considers the various facets of the issue may improve outcomes. By developing a combination of policies, services, education, training, and research, the Department of Social Development will hopefully succeed in averting similar situations in the future. It has been said that "an ounce of prevention is worth a pound of cure". Efforts to prevent unwanted pregnancies are far more valuable investments than attempts to remedy the problems associated with unplanned pregnancies. Ultimately, it should be kept in mind that supporting and empowering women is closely tied to the objective of preventing newborn deaths. Any measures adopted should reflect this principle.

Appendix A

Excerpt from Letter to the Deputy Minister of Social Development sent October 2009

RE: Recommendations in relation to the Protection of Vulnerable Newborn Children

Further to our recent report on the Protection of Vulnerable Newborn Children, forwarded in response to your Minister's request for advice in this matter, we have been asked to provide further advice in relation to recommendation 6 of our report. At pages 10 and 11 of the report, a copy of which is attached, we discuss options to the detainment of expectant mothers as a child protection matter. This practice was struck down by the Supreme Court of Canada in *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.* [1997] 3 SCR 925. We believe it is possible in exigent circumstances to reconcile the protection of a mother's liberty interests with the avoidance of substantial harm to her unborn child.

In the *Winnipeg* decision the majority held that the court's *parens patriae* jurisdiction could not be asserted in favour of the protection of an unborn child. The majority reasoned that to hold as much would constitute a development of the common law that was beyond the court's jurisdiction and that such a development could only come about through legislative action. The majority's finding in *Winnipeg* are clearly summarised in the case headnote as follows:

> The law of Canada does not recognize the unborn child as a legal person possessing rights. This is a general proposition applicable to all aspects of the law. Once a child is born, alive and viable, the law may recognize that its existence began before birth for certain limited purposes. But the only right recognized is that of the born person. Any right or interest the fetus may have remains inchoate and incomplete until the child's birth. It follows that, under the law, the fetus on whose behalf the appellant purported to act in seeking the detention order was not a legal person and possessed no legal rights. There was thus no legal person in whose interests the appellant could act or in whose interests a court order could be made. Putting the matter in terms of tort, there was no right to sue, whether for an injunction or damages, until the child was born alive and viable. Since the action at issue was commenced and the injunctive relief sought before the child's birth, under the law as it presently stands, it must fail.
>
> As well, courts do not have *parens patriae* jurisdiction over unborn children. The power of the court in *parens patriae*, as it stands, does not therefore support an order for the detention and treatment of a pregnant woman for the purpose of preventing harm to the unborn child.

As a general rule, judicial change to common law principles is confined to incremental change based largely on the mechanism of extending an existing principle to new circumstances. Courts will not extend the common law where the revision is major and its ramifications complex. To extend the law of tort to permit an order for the detention and treatment of a pregnant woman for the purpose of preventing harm to the unborn child would require major changes, involving moral choices and conflicts between fundamental interests and rights. Recognition of a fetal action against the mother for lifestyle choices would affect women, who might find themselves incarcerated and treated against their will for conduct alleged to harm the fetus. The proposed changes to the law have complex ramifications impossible for a court to fully assess, giving rise to the danger that the proposed order might impede the goal of healthy infants more than it would promote it. Taken together, the changes to the law of tort that would be required to support the order at issue are of such magnitude, consequence, and difficulty in policy terms that they exceed the proper incremental law-making powers of the courts. These are the sort of changes which should be left to the legislature.

Similarly, to extend the court's *parens patriae* jurisdiction to permit protection of unborn children would require a major change to the law of *parens patriae*. The same problems encountered in relation to extending tort law to the unborn arise in relation to extending the *parens patriae* jurisdiction of the court. The ramifications of the change would be significant and complex, since such change involves conflicts of fundamental rights and interests and difficult policy issues. A pregnant woman and her unborn child are one and to make orders protecting fetuses would radically impinge on the fundamental liberties of the mother, both as to lifestyle choices and how and as to where she chooses to live and be. The invasion of liberty involved in making court orders affecting the unborn child is far greater than the invasion of liberty involved in court orders relating to born children. In the latter case, the only liberty interest affected is the parent's interest in making decisions for his or her child. By contrast, extension of the *parens patriae* jurisdiction of the court to unborn children has the potential to affect a much broader range of liberty interests since the court cannot make decisions for the unborn child without inevitably making decisions for the mother herself. Such a change would not be an incremental change but a generic change of major impact and consequence. It would seriously intrude on the rights of women. If anything is to be done, the legislature is in a much better position to weigh the competing interests and arrive at a solution that is principled and minimally intrusive to pregnant women.

In New Brunswick however the *Family Services Act* RSNB 1973, c. F-2.2 provides that unborn children are children in need of protection within the meaning of the Act. Section 1 of the Act defines child as follows:

"child" means a person actually or apparently under the age of majority, unless otherwise specified or prescribed in this Act or the regulations, and includes

*(a)*an unborn child;

*(b)*a stillborn child;

*(c)*a child whose parents are not married to one another;

*(d)*a child to whom a person stands *in loco parentis*, if that person's spouse is a parent of the child; and

*(e)*when used in reference to the relationship between an adopted person and the person adopting or the relationship between a person and his birth mother or birth father, a person who has attained the age of majority;

but, for the purposes of making a determination under Part VII, does not include a person who has been married

This constitutes a distinct legislative choice in New Brunswick which should inform the court's application of the *Winnipeg* decision and the scope of *parens patriae* jurisdiction in this province. For greater certainty however, we submit that this legislative choice should now be confirmed in the interest of protecting unborn and vulnerable newborn children. Denying court remedies to unborn children under the *Judicature Act* RSNB 1973, c.J-2, even though the *Family Services Act* recognizes them as children deserving the same protection as every other child, would be inconsistent, and possibly contrary to the *Charter*.

The *Judicature Act* RSNB 1973, c.J-2, in New Brunswick sets out the role, functions and divisions of superior courts in New Brunswick. Section 11(9) of the Act explicitly confers *parens patriae* jurisdiction on the Family Division of the Court of Queen's Bench. Subsection 11(9) states:

11(9) The Family Division has and may exercise jurisdiction as parens patriae.

This section could be amended to extend the court's inherent jurisdiction in a way which protects the unborn in clear situations of harm while safeguarding the rights of pregnant mothers. The careful balancing of interests required and pointed out in the court's analysis in *Winnipeg* could be achieved by including statutory language that confirms the court's role and authority to act while circumscribing it to cases of substantial harm to the unborn and by limiting the types of orders that may be available in this circumstance.

> mère, tant en ce qui concerne le choix d'un mode de vie que sa manière d'être et l'endroit où elle choisit de vivre. L'atteinte à la liberté qui est inhérente à l'ordonnance visant l'enfant à naître est beaucoup plus étendue que celle qui découle de l'ordonnance judiciaire visant l'enfant né. Dans ce dernier cas, le seul droit dont l'exercice est entravé est celui du parent de prendre des décisions relatives à son enfant. Par contre, l'exercice de la compétence *parens patriae* au bénéfice de l'enfant à naître est susceptible de porter atteinte à une gamme plus étendue de libertés puisque le tribunal ne peut prendre une décision touchant l'enfant à naître sans que, inévitablement, cette décision ne lie la mère elle-même. Une telle modification ne ferait pas évoluer le droit de façon progressive car il s'agirait d'un changement de portée générale dont les effets et les répercussions seraient considérables. Elle empiéterait sérieusement sur les droits de la femme. Si une mesure doit être prise, le législateur est en bien meilleure position pour soupeser les intérêts opposés et arriver à une solution raisonnée qui porte le moins possible atteinte aux droits de la femme enceinte.

Au Nouveau-Brunswick toutefois, selon la *Loi sur les services à la famille*, L.R.N.-B. 1973, chapitre F-2.2, les enfants à naître sont des enfants qui ont besoin d'être protégés au sens de la *Loi*. L'article 1 de la *Loi* définit le terme « enfant » comme suit :

> « enfant » désigne une personne effectivement ou apparemment mineure, sauf mention ou prescription contraire de la présente loi ou des règlements, et s'entend également
>
> a) d'un enfant à naître;
>
> b) d'un enfant mort-né;
>
> c) d'un enfant dont les parents ne sont pas mariés l'un à l'autre;
>
> d) d'un enfant pour lequel une personne agit in *loco parentis* si le conjoint de cette personne est un parent de l'enfant;
>
> e) d'une personne majeure, lorsque le mot est utilisé à propos du lien existant entre une personne adoptée et celle qui l'adopte, ou entre une personne et sa mère par le sang ou son père par le sang; mais, aux fins d'une décision à rendre en application de la Partie VII, ne comprend pas une personne qui a été mariée.

Cela représente un choix législatif distinct au Nouveau-Brunswick qui devrait guider un tribunal souhaitant appliquer l'arrêt de *Winnipeg* et déterminer l'étendue de sa compétence *parens*

patriae dans cette province. Toutefois, pour plus de certitude, nous estimons que ce choix législatif devrait maintenant être confirmé afin d'assurer la protection des enfants à naître et des nouveau-nés vulnérables.

La *Loi sur l'organisation judiciaire*, L.R.N.-B. 1973, chapitre J-2, du Nouveau-Brunswick détermine le rôle, les fonctions et les divisions des tribunaux supérieurs du Nouveau-Brunswick. Le paragraphe 11(9) de la *Loi* confère explicitement la compétence *parens patriae* à la Division de la famille de la Cour du Banc de la Reine en ces mots :

> 11(9) La Division de la famille peut intervenir en qualité de *parens patriae*.

On pourrait modifier cet article pour élargir la compétence inhérente de la Cour de manière à pouvoir protéger un enfant à naître lorsqu'il est clair qu'un tel enfant risque de subir un préjudice tout en protégeant les droits des femmes enceintes. Le juste équilibre des intérêts qu'il faut assurer et dont il est question dans l'analyse du tribunal dans la cause de *Winnipeg* pourrait être réalisé en adoptant une disposition législative qui confirmerait le rôle du tribunal et son autorité d'agir tout en limitant cette autorité aux cas de préjudice grave à l'enfant à naître et en limitant le genre d'ordonnances que le tribunal pourrait rendre dans de tels cas.

Légiférer ainsi apporterait une solution législative responsable au vide juridique créé par la décision de la Cour suprême du Canada de 1996 qui prive l'enfant à naître de personnalité juridique. Le législateur pourrait fournir une orientation pour permettre aux tribunaux d'intervenir lorsque cela est approprié et leur confier la délicate tâche de trouver un équilibre entre le droit de la mère à la liberté et le droit de l'enfant à la vie.

Pour répondre aux diverses préoccupations décrites ci-dessus, on pourrait ajouter à la *Loi sur l'organisation judiciaire* une disposition législative ressemblant à ce qui suit :

> *11(9) La Division de la famille peut intervenir en qualité de* parens patriae.
>
> ***11(9.1) Nonobstant la portée générale du paragraphe (9), la Division de la famille peut exercer sa compétence* parens patriae *à l'égard d'un enfant à naître dans les cas où la mère va porter l'enfant à terme et dans la mesure additionnelle où :***
>
> ***a) le droit à la liberté d'une autre personne n'est pas lésé de manière déraisonnable; et***
> ***b) il a été établi que l'enfant à naître cours un risque substantiel de subir un préjudice grave ou de mourir après sa naissance.***

11(9.2) Une ordonnance rendue en vertu du paragraphe (9.1) peut exiger de la mère d'un enfant à naître qui porte cet enfant à terme :

c) qu'elle subisse un examen médical pour confirmer la grossesse ou s'assurer de la santé et de la sécurité de l'enfant qu'elle porte;

d) qu'elle fasse appel à des services de consultation concernant la préparation à la naissance et le rôle parental ou les services d'adoption;

e) qu'elle rende régulièrement visite à un travailleur à la protection de l'enfance pendant et après sa grossesse; ou

f) qu'elle obéisse à toute autre directive que la Cour juge nécessaire pour protéger l'enfant et la mère et qui est compatible avec le droit de la mère à la liberté, compte tenu de toutes les circonstances du cas.

Il est possible qu'il soit plus approprié d'ajouter de telles dispositions législatives à la *Loi sur les services à la famille* et d'apporter seulement une modification corrélative à la *Loi sur l'organisation judiciaire* qui se lirait comme suit :

***11(9.1) Nonobstant la portée générale du paragraphe (9), la Cour peut exercer sa compétence* parens patriae *à l'égard d'un enfant à naître conformément à l'article ... de la* Loi sur les services à la famille.**

Dans l'arrêt de *Winnipeg*, la Cour suprême du Canada a essentiellement renvoyé la question de la protection de l'enfant à naître aux législateurs. En général, les législateurs au Canada ont observé un silence prudent face à l'invitation de la Cour. Au Nouveau-Brunswick, la décision qui s'impose est relativement simple puisqu'il suffirait que le législateur confirme un choix législatif qui a déjà été fait. Ne pas agir par rapport à la question ne ferait que reléguer davantage les enfants à naître et les nouveau-nés vulnérables au rang de personnes privées de leurs droits.

Il est certain que suite aux morts tragiques récentes de nouveaux-nés au Nouveau-Bruinswick que des mesures peuvent et devraient être prises pour protéger les enfants dans les cas où il y a clairement un danger d'infanticide. Les tribunaux, et non les législateurs, sont les mieux placés pour traiter avec discernement et justice les conflits de droits qui surgissent inévitablement dans de tels cas. Il existe un important consensus pour permettre à la société et à nos tribunaux de s'occuper efficacement de ces cas avant que des décès ne surviennent. C'est dans un esprit de consensus et de défense des plus vulnérables d'entre nous que nous formulons le présent avis.

Bernard Richard
Ombudsman et Défenseur des enfants et de la jeunesse

Protection of Vulnerable Newborn Children:

A Holistic Approach

Ombudsman and Child and Youth Advocate Report

Bernard Richard
New Brunswick Ombudsman and Child and Youth Advocate
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Protection of Vulnerable New Born Children: A Holistic Approach
A Report of the New Brunswick Ombdusman and Youth and Youth Advocate

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Published by:
Office of the Ombudsman & Child and Youth Advocate
Province of New Brunswick
P.O. Box 6000
Fredericton, New Brunswick
E3B 5H1
Canada

September 2009

Printed in New Brunswick

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I. BACKGROUND

Purpose

On July 24, 2009, the Child Death Review Committee (the "Committee") submitted its report regarding the death of a newborn child who had been known to the child protection system. The parents of the child in question were in regular contact with the Department of Social Development ("Social Development"). Eventually, it was discovered that the mother had given birth. The RCMP became involved and criminal charges were brought against both the mother and the father of the newborn. The Committee's report contained only one recommendation:

> "That the Department of Social Development explore what actions would or should be available to the Minister when it is suspected that a person, especially one known to the Department, is pregnant or appears to be hiding a pregnancy and that this action may prove harmful either to themselves or the baby once delivered."

The Department of Social Development has requested a submission from the Child and Youth Advocate regarding this recommendation.

II. ANALYSIS

(a) Academic Literature

The killing of newborn infants is not a new phenomenon, yet modern society is still struggling with understanding the causes and the ideal way to address it.

Several studies have revealed that there are remarkable similarities among the women who commit infanticide. These women are usually young, commonly in their teens or early twenties, are unmarried, frequently not involved in a relationship with the father, and generally live with their parents. They are socially isolated, have little or no financial independence and are emotionally immature. They are of all ethnicities and come from varying social backgrounds.[1]

The denial of a pregnancy to others and sometimes even to oneself, is a common feature with infanticide. The degree of denial of the pregnancy can vary. In women who cognitively realize that they are pregnant but do not experience the normal emotions associated with pregnancy and do not prepare for it, it is called affective denial. In women who pervasively deny pregnancy and do not intellectually acknowledge it to themselves, it is it called pervasive denial.[2] Social factors may contribute to the denial. These factors include social isolation, fear of pregnancy, and cultures which find sexual relations outside of marriage unacceptable. Women experiencing this denial are generally lacking a positive

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[1] National Abandoned Infants Assistance Resource Centre. Discarded infants and neonaticide: a review of the literature. Berkeley: University of California; 2004.; Spinelli MG. A systematic investigation of 16 cases of neonaticide. Am J Psychiatry 2001; 158:811-3. Friedman SH. Characteristics of Women Who Deny or Conceal Pregnancy. Psychosomatics 48;2, March-April 2007.

[2] Miller LJ. "Denial of pregnancy." In Infanticide: Psychosocial and legal perspectives on mothers who kill (pp. 81 – 104). (2003: Washington, D.C., American Psychiatric Publishing, Inc).

support system and their family may participate in the denial of the pregnancy.[3]

In summary, women who commit infanticide are a subgroup of the sexually active population whose social and economic situation are such that having and raising children would be exceptionally difficult.[4] Based on the research done thus far, criminally prosecuting women for these acts will have little deterrent effect. One researcher suggests that the answer to preventing infanticide lies in "identifying and remedying girls' vulnerability long before they become pregnant".[5] In other words while the public sanctioning of the prevention of infanticide through criminal code provisions may be an appropriate and necessary measure, society cannot rely on the *Criminal Code* provisions in this case as a realistic deterrent or preventive measure.

(b) Applicable Law

1. *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.* [6]

In this case, the Manitoba Court of Queen's Bench ordered that D.F.G. be placed in custody of the Director of Child and Family Services (the "Director") and be detained at a treatment centre until the birth of her child. She was also ordered to follow treatment as prescribed by the Director. D.F.G. was addicted to glue sniffing and had already given birth to two previous infants who suffered from the effects of her addiction. She was now pregnant with her fourth child and the Director sought to protect that unborn child. At the time that the Supreme Court released its decision, D.F.G. had voluntarily undertaken treatment and given birth to a healthy child.

The majority decision written by Justice McLachlin considered whether the Supreme Court had authority under common law principles to order that a pregnant woman be detained and/or undergo treatment. Two areas of the common law were considered: tort law and *parens patriae* jurisdiction, also called wardship jurisdiction. In both cases the Supreme Court found that the change to the common law required to make this type of order is of such "magnitude, consequence and policy" that it exceeds the "proper incremental law-making powers of the courts" and that such a change is a task more appropriate for the legislature.

Under common law, legal personhood accrues at birth and any interest or right the fetus may have remains "inchoate and incomplete" until after a successful birth. The order requested by the director would require a change to this common law principle. It would also require that tort law be changed to create a cause of action for lifestyle choices of the pregnant mother which might affect others and an extension of injunctive relief in civil cases to the detention of another person. The Supreme Court found that the law is clear that courts do not have *parens patriae* or wardship jurisdiction over unborn children and that the legislature is better positioned to weigh the interests involved and arrive at a principled and minimally intrusive solution.

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[3] National Abandoned Infants Assistance Resource Centre. Discarded infants and neonaticide: a review of the literature. Berkeley: University of California.

[4] Lee ACW, Li CH, Kwong NS, So Kt. Hong Kong Med J 2006; 12:61-4.

[5] Michelle Oberman, Mothers Who Kill: Coming to Terms with Modern American Infanticide, 34 American Criminal Law Review 1 (Fall 1996) which studied 47 neonaticide cases reported in the media between 1988-1995 at 73.

[6] [1997] 3 S.C.R. 925.

The minority decision, written by Justice Major and supported by Justice Sopinka, disagrees that courts cannot make changes to the law to allow for such an order as is being considered in this case. Justice Major finds that such an order can be made by a court in exercising its *parens patriae* jurisdiction when there is a reasonable probability of the conduct of a pregnant woman causing serious and irreparable harm to the fetus within her. He finds that the "born alive" rule, that a fetus has to be born alive before any legal rights of personhood can accrue should be set aside because its purpose was based on a time when it could not be determined whether the unborn child was alive until birth. Present medical technology renders the rule outdated and indefensible. Applying the *parens patriae* jurisdiction to the unborn can only be possible where a woman has decided to carry a child to term as opposed to terminating the pregnancy; where there is proof that irreparable harm will be caused; where the remedy is least intrusive; and where the process is procedurally fair. Among other authorities, the minority cites the UN Declaration of the Rights of the Child and its preamble which states "the child...needs special safeguards and care, including appropriate legal protection, **before** as well as after birth..." [emphasis added]. The minority appears to envision applying the *parens patriae* jurisdiction in this manner only in cases where the unborn child requires protection from a mother who abuses substances.

2. Criminal Code of Canada

The *Criminal Code* contains provisions against abandoning a child (section 218), killing an unborn child in the act of birth (section 238), concealing the body of a child in order to conceal its birth (section 243) and neglecting to obtain assistance with child birth with the intent to conceal the birth (section 242). It also contains what is known as an infanticide provision which limits imprisonment to five years if a woman's mind is disturbed by the effects of lactation or birth at the time that infanticide is committed. Only sections 242 and 233 apply to female persons. Section 223 states that a child becomes a human being when it has "completely proceeded, in a living state, from the body of its mother."

(c) Other Jurisdictions

In canvassing the measures taken by other jurisdictions in responding to this problem, including all Canadian and several European and American jurisdictions, no jurisdiction was found where measures are taken to detain pregnant women or regulate any aspect of their behaviour.

1. Canada

The child welfare agencies in other Canadian jurisdictions respond in relatively similar ways. They offer services to pregnant women who may be considered to be more likely than others to take actions which will put their unborn child at risk. If these services are refused by the expectant mother, hospitals will be asked to notify child welfare agencies when the mother presents for birth. This is commonly called a "birth alert". This approach is taken in New Brunswick and was taken in the present case. As in New Brunswick, child welfare agencies in other provinces do not have authority to take further action until the child is born. This is in contrast to the United Kingdom where child welfare agencies have a policy that allows child protection plans to be made regarding unborn children. However, these plans cannot allow for the detainment of pregnant women.

Some government officials in other jurisdictions noted that hospital staff is very reliable in reporting to child protection authorities any pregnant woman who presents at the hospital and who had not

received prenatal care. It is notable that in Manitoba, such notification is automatically required by doctors who are treating any pregnant women under the age of 18.[7]

New Brunswick is different from several other Canadian jurisdictions[8] in including "unborn child" as part of the definition of "child" in the *Family Services Act*.[9] However, Social Development does not appear to have any programs which carry out this mandate with the possible exception of Birth Parent Services. *Regulation 81-132*, pursuant to the *Family Services Act*, narrows the definition of child from that found in the *Act*, by excluding the phrase 'unborn child' from the definition of "child" for the purpose of Part III, Child Protection. This inconsistency in definitions between the *Act* and the *Regulation* leads to confusion and may require resolution.

2. United States of America

Most American jurisdictions have enacted what is commonly known as "Safe Haven" legislation. These provisions allow newborns to be safely abandoned in designated locations and will be discussed in more detail below. Non-profit organizations in two American jurisdictions also have developed programs which intend to prevent the need for newborn abandonment legislation.

i) Nebraska Children's Home Society

According to the President of the Adoption Council of Canada,[10] an adoption agency in Nebraska, Nebraska's Children Home Society (N.C.H.S.), has implemented another solution which should be considered as an option to the issue of baby abandonment and infanticide. The Nebraska program is a statewide, 24-hour, 365 days a year hotline for unplanned pregnancies answered by a N.C.H.S. social worker. This state-wide agency can have a supportive caseworker visit the mother quickly anywhere in Nebraska. The worker will help the mother get to the hospital or, if already there, offer her the opportunity to provide the infant with safe, confidential care in a temporary, safe, "cradle care" home. The intent is to provide the mother with time to step back and evaluate her situation while keeping her baby safe. When she is ready, a more permanent plan, either parenting or adoption, can be discussed. The mother's identity remains confidential and her rights to the child remain intact. According to N.C.H.S., the program has been more successful than Safe Haven legislation in other states.

The N.C.H.S. program recognizes the importance of education in the prevention of newborn killing and abandonment. N.C.H.S. developed both a middle school and a high school curriculum to heighten awareness of young people experiencing unplanned pregnancies; the hotline number is posted in colleges across the state; crisis pregnancy centers are aware of the program; information was supplied to doctors and hospitals for their high risk patients; and a billboard campaign publicized the hotline number.

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[7] Telephone communication witn Jane Cowell of BC Ministry of Child and Family Development and Michelle Hickley of Manitoba Department of Family Services and Housing.

[8] British Columbia, Alberta, Manitoba, Ontario, North West Territories, Yukon, Nova Scotia, PEI, Newfoundland & Labrador, unsure of Saskatchewan & Quebec.

[9] S.N.B. 1980, c. F-2.2.

[10] Sandra Scarth, President Adoption Council of Canada; in email sent to our office, dated September 2, 2009, [Adoption Council of Canada].

N.C.H.S. believes that they have been successful in reaching high risk pregnant women who conceal their pregnancies. They state that, out of a total of 600 calls annually since 2000, they received 53 cases which they considered extremely high risk where the mother had denied the pregnancy and there was genuine concern for the safety of the baby. Most of the mothers were in panic mode. N.C.H.S. caseworkers went to them, offered support, education on the mother's options and rights, and the rights of the father.

Of the 53 cases, 38 moms chose to immediately put the infant into cradle care, the N.C.H.S. version of safe haven. Later, sometimes days later, moms returned to discuss plans for their child. The interim when baby is safe and the mother has time to herself is extremely important. After discussing the options with N.C.H.S. staff, 12 mothers decided to parent while the other 26 made an adoptive plan. Of the 15 mothers that initially chose not to use cradle care, 7 parented while 8 mothers made an adoptive plan. When a parenting plan was made, they were supplied with diapers, formula, clothing and other needs to help them with their child. The agency continues to make their services available to them. The overall goal is to insure the safety of the child and allow the mother the time to evaluate her situation.[11]

ii) Project Cuddle

California is home to a non-profit organization named Project Cuddle which claims it is ready to serve the whole of the United States as well as Canada. Project Cuddle has been operating for 13 years through a hotline. Women who are concealing a pregnancy can call 24 hours a day, 7 days a week and confidentiality is assured. Their website claims that they work with frightened girls or women to help them find safe, legal options so that baby abandonment is avoided. They also state that they can help these women to complete their education and obtain employment.[12]

III. OPTIONS

There are no simple solutions to the problem of infanticide and infant abandonment. Social isolation and denial of a pregnancy prevent these women from seeking help. In such circumstances, it is difficult for care providers and other professionals to become aware of these at-risk pregnant mothers. Often child protection agencies have no knowledge of these situations until these women present to a hospital or an infant's body is found. As a result, it is presumed that many infanticides go undetected.[13]

However, many possible preventative measures, specifically in the areas of legislation, services, education and research, may assist social workers and other professionals identify at-risk pregnant women and perhaps increase the likelihood of preventing infanticide.

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[11] "Nebraska 'Safe Haven' Program"; Bob Brandt, Executive Director, Nebraska Children's Home Society, a licensed private, non-sectarian, non-profit child agency focused on promoting adoption and offering support to pregnant mothers, including reaching high risk mothers in denial; copy of undated article sent to our office by Sandra Scarth, President of Adoption Council of Canada, via email dated September 2, 2009.

[12] www.projectcuddle.org

[13] National Abandoned Infants Assistance Resource Centre. Discarded infants and neonaticide: a review of the literature. Berkeley: University of California, September 2004.

(a) Legislation

1. Safe Haven Legislation

Safe Haven legislation exists in several jurisdictions including the United States, Germany, Japan, Italy, Pakistan, Hungary and Austria. It allows parents to leave their newborn at a 'safe haven' such as a church or hospital, no questions asked. In the United States, the legislation varies from state to state with respect to with whom the child can be left, the level of anonymity and the age of the child, among other factors.

Currently, there is no Safe Haven legislation in Canada. In New Brunswick, *An Act to Amend the Family Services Act* was introduced in the legislature by the leader of the opposition on May 13, 2009. The Bill was referred to the Standing Committee on Law Amendments for future study. It consists of the following sections:

> *1 Section 1 of the Family Services Act, chapter F-2.2 of the Acts of New Brunswick, 1980, is amended by adding the following definition in alphabetical order:*
>
> > *"safe haven" means that parents of children 72 hours old or younger are able to give possession of their child away to an emergency room nurse without fear of prosecution provided the child has no signs of abuse or neglect;*
>
> *2 Section 3 of the Act is amended by adding after subsection (3) the following:*
>
> > *3(4) The Minister and any person authorized under paragraph (1)(b) to exercise any authority, power, duty or function conferred upon the Minister shall create and implement a safe haven policy.*
>
> *3 This Act comes into force on a day to be fixed by proclamation.*

On the surface, Safe Haven legislation, like the title itself conjures up the belief that it will save and protect children from abandonment and death. However, upon closer scrutiny, while its goal may be noble, it may not actually solve the problem it is meant to address and it may actually be detrimental to children in some circumstances.

There are four areas of concern raised by the legalization of child abandonment. The first issue is that a Safe Haven law may conflict with provincial legislation and policies regarding adoption. There is also a concern that such a law may encourage women to conceal pregnancies and then abandon infants who otherwise would have been placed for adoption through established legal procedures or would have been raised by biological parents or relatives.[14] According to their website[15], the American National Conference of State Legislatures ("N.C.S.L.") is a "bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths and territories." The N.C.S.L. raises the concern that

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[14] "Unintended Consequences: 'Safe Haven' laws are causing problems, not solving them", Evan B. Donaldson Adoption Institute (New York); published March 2003, New York, N.Y. [Donaldson Adoption Institute].

[15] http://www.ncsl.org/

Safe Haven laws may conflict with the biological parents' rights to due process in proceedings of the termination of their parental rights.[16] A mother who abandons her infant should understand the legal consequence of doing so where her parental rights are concerned. The province will want to carefully examine any existing termination of parental rights provisions to avoid conflicts in the drafting of a Safe Haven law.

In addition, children's fundamental rights to their genealogical, medical, and health histories, as well as information relating to identity, are forfeited when they are abandoned. A Canadian organization which is strongly opposed to legislated safe havens is the Adoption Council of Canada ("Adoption Council"). The Adoption Council "takes a strong position that Canada... has implemented the United Nations Convention on the Rights of the Child and that Convention says that states should assure the child his/her identity." Safe Haven legislation would deny the child this basic right. The Adoption Council raises an important point when they state that "[Safe Haven legislation] is particularly troubling for Aboriginal children who could also be denied their right to educational and other benefits as well as losing the connection to their heritage."[17] The same potential loss of rights presents itself in the case of children with minority language rights.

In the United States, adoption advocates have similar concerns. Adoption and other child welfare experts also point out that the legislation may not be necessary because most states and provinces will not prosecute women who give birth and relinquish their newborns in the hospital. Additionally, every state allows women to voluntarily relinquish their infants for adoption.[18]

A second issue relates to the impact on parental rights. Safe Haven legislation may create the opportunity for "upset family members, disgruntled boyfriends, or others who have no legal rights", to abandon babies without the birth mothers' consent.[19] Any legislation should be crafted to protect a mother's rights, if someone other than a mother dropped a child off. If anonymity will be guaranteed, it must ensure that the person has the authority to give up a newborn.[20]

Paternal rights are also involved. A Safe Haven law may deprive biological fathers of their legal right to care for their children when they have "the desire and personal resources to do so".[21] In most of the United States, according to one source, the birth father retains all parental rights if he was unaware that the child's mother relinquished control of the child.[22] However, the source does not specify how this is accomplished.

A few states require "a check of the putative father registry and include provisions to contact the putative father, but most do not contain provisions to address notification of fathers who may not be aware of the child's birth." Utah's legislation addresses this concern by requiring a search of the "confidential registry for unmarried biological parents and requiring that notice be sent to each

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[16] "Update: Safe Havens for abandoned infants"; National Conference of State Legislatures (U.S.A.); October 23, 2003. Article provided by the Adoption Council of Canada [State Legislatures].

[17] Adoption Council of Canada, *supra* note 10.

[18] State Legislatures, *supra* note 16.

[19] Donaldson Adoption Institute, *supra* note 14.

[20] Pat Gallagher-Jette, a Saint John lawyer who represents children in child protection matters and supports the Bill; "Support grows for proposed N.B. 'safe haven' law to protect newborns"; online CBC News May 15, 2009.

[21] Donaldson Adoption Institute, *supra* note 14.

[22] "Safe-Haven Laws Help Protect Newborns" Lawyer.com; online; February 2008.

potential father identified in the registry."[23]

A third issue is that "Safe Haven" laws have an underlying social message that deserting one's children is acceptable.[24] Legalizing the abandonment of a child does not support our province's social policies. Condoning the abandonment of infants intuitively goes against society's desire to unfailingly value the lives of our children.

The fourth issue regarding Safe Haven legislation is that there is little research to demonstrate that it actually results in saving the lives of infants. In Canada, no statistics on the number of unsafe abandonment of infants are formally collected. The Adoption Council provided our office with an article published by the N.C.S.L. The N.C.S.L. states that "safe haven" laws "continue to have a limited effect" and that "unlawful abandonment continues to be a problem" even in states which have enacted such laws. New Jersey and Texas did report a decrease in unsafe abandonment, particularly following an awareness campaign of the option, but unsafe abandonments are still occurring in Illinois, Louisiana, California, Colorado and Michigan. Michigan and Colorado also have reports of mothers attempting to regain custody of their babies after they had abandoned them illegally.[25]

Dawn Geras of the Save Abandoned Babies Foundation in Illinois stated that 32 babies have been brought in under the safe-haven option since her state passed legislation in 2001. There have also been 46 'illegal abandonments' in the state since the law has passed, but "that number appears to be dropping."[26] However, many policymakers are concerned that these laws may only encourage parental irresponsibility. Given that so little is known about the women who abandon their babies, "there is no proof that the legislation will discourage mothers from leaving their infants in unsafe places..."[27]

The Adoption Council believes that a young woman who has denied her pregnancy and who is in a panic and terrified when the birth is imminent, is"...in no condition to make such life-changing decisions as to whether to call for help or to abandon the child."[28] The Adoption Council adds, "...we do not believe that [Safe Haven] legislation will accomplish what it sets out to do."

Should Safe Haven legislation move forward, it would need to adequately address the issues of parental and children's rights and any promotion of it should include all options available to pregnant mothers in crisis.

One final observation relating to Safe Haven legislation is its potential for conflict with federal statutes, in particular the *Criminal Code*. Section 218 of the *Criminal Code* states as follows:

> *Part VIII – Offences Against the Person and Reputation*
>
> *Duties Tending to Preservation of Life*
>
> ***Abandoning child*** ***218.*** *Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured,*
>
> *(a) is guilty of an indictable offence and liable to imprisonment for a term not*

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[23] State Legislatures, *supra* note 16.
[24] Donaldson Adoption Institute, *supra* note 14.
[25] State Legislatures, *supra* note 16.
[26] "Sask. policy like safe-haven law", Angela Hall, Leader-Post, May 25, 2007 [Sask. Policy].
[27] State Legislatures, *supra* note 16.
[28] Adoption Council of Canada, *supra* note 10.

exceeding five years; or

(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.[29]

Any Safe Haven legislation drafted by a provincial jurisdiction in Canada runs the risk of being struck down as *ultra vires* the province as an encroachment upon the federal government's exclusive jurisdiction in relation to criminal law.

2. Detainment of Pregnant Women

Deserving of discussion are measures designed to protect unborn children by requiring mothers who may harm them to receive particular treatment or reside somewhere until the birth of the child. As discussed above, the Supreme Court of Canada found that such a law would need to be enacted by the legislature. The Supreme Court left untouched the issue of whether such a law would be a violation of the *Canadian Charter of Rights and Freedoms*, though that is a possibility. Further, the Royal Commission on new Reproductive Technologies made recommendations which rejected state-sanctioned intervention in pregnancy and birth in its report released in December 1993 and titled *Proceed With Care*.[30]

Any measure which interfered with the liberty of pregnant women would represent a marked departure from present law. Such a shift would elevate the rights of unborn persons over those of another person, the mother, and would permit deprivations of liberty of women. Our society only sanctions such deprivations under very serious circumstances, such as breaches of the *Criminal Code* or the presence of a danger to oneself and others as a result of mental illness. Many New Brunswickers would argue that the protection of unborn children from mothers who intend to harm their child at birth by abandonment or by committing infanticide is a pressing social concern and that the deprivation of liberty which may be required to protect the child – for instance mandatory counselling, testing to confirm pregnancy, or even more intrusive monitoring of the mother's health and whereabouts as a result of judicial ordinance – may be reasonable and justified infringements upon a mother's liberty in a free and democratic society.

While the majority decision of the Supreme Court of Canada in the *Winnipeg* case, discussed above, confirms that Courts do not have inherent *parens patriae* jurisdiction over unborn children, our analysis above of the recent legislative proposal for a Safe Haven law in New Brunswick suggests that the Legislative response to this situation must be more discerning. One possible response, which would be compatible with the majority and minority opinion in *Winnipeg* and which would be responsive to the democratic support for legislative action, would be to simply confirm the Superior court's *parens patriae* jurisdiction over the unborn in New Brunswick. This might be done through amendments to the *Judicature Act* or through a separate legislative enactment. This approach would be consistent with New Brunswick's existing legislative choice under the *Family Services Act* which includes unborn children in the definition of child. It would also afford the greatest protection possible to the liberty interests of

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[29] R.S.C., 1985, c. C-46, s. 218; 2005, c. 32, s. 12.

[30] Canada, Royal Commission on new Reproductive Technologies, *Proceed With Care: Final Report of the royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services, 1993).

expectant mothers in the province. Where individual rights of persons clash with one another, courts and not legislatures, are most able to balance the interests at stake and arrive at just solutions. The issue need not be confused with legislative recognition of foetal rights generally as the provisions could be limited and invoked only where a substantial risk of significant harm or death to the unborn child is demonstrated. Liberty interests of the mother could be protected also through carefully crafted provisions limiting the scope of protective orders issued, which need not extend so far as any prolonged or forcible detainment.

Social Development interventions may be more effective and may save an infant's life if a judicial protection order was available, if only to confirm a pregnancy and offer counselling. Most often young mothers exercising these options are secluded, isolated, and see no other options. In some cases they may also be unduly influenced by a partner or father of the child already harbouring a criminal intent. In both cases, the state has every right and interest to intercede in favour of protecting the child, through measures such as those proposed. What is required is a balanced and caring approach respectful of a mother's liberty and her child's life.

(b) Services

Of the last three high profile cases of infant death in New Brunswick, two of the mothers were 19, while the age of the other mother is unknown. A brief scan of media reports from across the country over the past several years indicates that while this is not exclusively a teen pregnancy issue, teenage mothers are participants in baby abandonment and infanticide.

The Department of Social Development has launched the Youth at Risk Project. Youth at Risk targets those who are involved in a pregnancy, either the pregnant woman or biological father. The details of the services provided under that project are not yet known to the Child and Youth Advocate. It may be appropriate to include under that model, more services to young mothers such as seen in the Nebraska model.

The Nebraska model has many aspects which would prove useful in preventing newborn killing and abandonment. Its program of mobilizing resources to assist those who have concealed their pregnancies to prevent infant abandonment while allowing them time to consider their options is an ideal response when these women are brave enough to come forward.

The Department of Social Development could provide a counsellor trained to assist women who are concealing their pregnancy in order to help the expectant mother recognize her pregnancy and make plans for her newborn. This counsellor could be called upon by other social workers in situations such as the present case.

Any services which aid young mothers would be helpful in demonstrating that support exists for them. Hopefully, this would assist in alleviating some fears around pregnancy. This in turn may contribute to a decrease of denial or concealment of a pregnancy.

(c) Education and Training

Education is an integral preventative measure in combating the issue of child abandonment and infanticide at several points along the pre-conception to postpartum spectrum.

One component of any education plan should include educating teens on the issue. As a result of recommendations 11 and 12 in the Children Come First Report, the Department of Health in conjunction with the Department of Education has developed the Healthy Learners in School program which aims to improve the health, wellness and learning potential of New Brunswick's students by promoting healthy behaviours to be carried into adulthood. This program as well as sexual health education programs should be reviewed to insure that they address the issue of child abandonment by educating youth about sexual health, contraception, pregnancy denial, the danger of a lack of prenatal care and other family planning issues.

Service providers should be educated regarding denial and concealment of pregnancy, should be trained to identify the signs and best approaches for addressing these situations, and should be informed about available resources.

It is important to note that there is a need to improve education and increase awareness of services and policies already available among our target population. Our target audience should not only include at-risk mothers but partners, family members, and friends of at risk mothers as well. One example is the "unwritten" policy not to prosecute a mother who safely abandons her newborn. In a newspaper article published in Saskatchewan in 2007, [31] that province's Justice Minister Frank Quennell said that "the policy in Saskatchewan is not to prosecute a mother who hands over a baby to an appropriate health or social service agency, and so-called 'safe-haven' legislation wouldn't accomplish anything further." It may be helpful to publicize a similar position in New Brunswick.

(d) Research

In order to develop an action plan to resolve this problem, it is important to conduct research in this area to help determine why parents abandon their children or commit infanticide. It is difficult to find a solution to a problem without being confident of the cause. Additional research is necessary to fully understand the issue in order to devise effective preventative measures. Research is especially needed into the efficacy of Safe Haven legislation. Keeping accurate statistics is also important in the evaluation of any program or service that is adopted by the province.

IV. Recommended Action

Any effective solution needs to address the issues which appear to engender the tragedy of newborn abandonment and infanticide: those of women's empowerment and the perception of pregnancy as being an insurmountable predicament because of financial, emotional, or other barriers. As a result, we recommend that the Minister of Social Development take the following actions:

1. **Provide services** to pregnant women and young parents such as a hotline and specialized

[31] Sask. Policy, *supra* note 26.

counsellors. Requiring the most attention are services which target women who may be experiencing pregnancy denial. Project Cuddle in California already operates a hotline program which is available to women in Canada. Developing a similar hotline to serve New Brunswick at-risk mothers may be valuable. Other services would include distribution of free and available contraception, and strengthening support to low-income pregnant women and young parents. Support and help should be in place for the women who abandon newborns or have been in pregnancy denial as these mothers may have mental health or addiction issues[32].

2. **Educate** youth on family planning issues including contraception, the dangers of a lack of prenatal care, baby abandonment as well as training service providers on identifying and treating the denial of a pregnancy. This should be implemented in partnership with the Department of Education.

3. **Research** the causes of infant abandonment. Since the issue seems closely tied with the social situation of women, this could be performed in conjunction with the Advisory Council on the Status of Women. Research should also be done on the effectiveness of Safe Haven legislation before such legislation is considered further.

4. **Implement policy** which can assist social workers in determining the appropriate steps to take when encountering a woman who may be at risk of harming her unborn child. This policy would require that the pregnant woman be contacted by a counsellor who is trained to assist women in pregnancy denial and be given the number to the hotline. It should also address the involvement of health professionals and hospitals.

5. **Review** the terms of reference of the Child Death Review Committee to determine if its objectives are still desired and, if so, provide the committee with the resources or other assistance required to carry out those objectives.

6. **Legislate** to restore to the superior courts the necessary jurisdiction to protect unborn children from serious harm or death in appropriate circumstances.

V. Conclusion

The discovery of the death of a child is always shocking and upsetting for a community. Even more disconcerting is when authorities are involved before the death occurs and are unable to intervene effectively. While Safe Haven legislation represents good intentions, there is no concrete evidence that it prevents infanticide. If Safe Haven legislation is enacted, it should form part of a larger effort to reach at-risk pregnant teenagers and women and should be accompanied by measures to ensure its effectiveness such as signs displaying designated safe havens.

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[32] Sharon Amirault, executive director of First Steps, a group that provides transitional housing and support services to pregnant teens and deals with desperate moms every day; "Support grows for proposed N.B. 'safe haven' law to protect newborns"; online CBC News May 15, 2009.

Rather than relying solely on legislation to address the difficult dilemma of abandoned newborn infants, this paper presents several additional recommendations. There is no single solution to the problem of infanticide; however, a response which considers the various facets of the issue may improve outcomes. By developing a combination of policies, services, education, training, and research, the Department of Social Development will hopefully succeed in averting similar situations in the future. It has been said that "an ounce of prevention is worth a pound of cure". Efforts to prevent unwanted pregnancies are far more valuable investments than attempts to remedy the problems associated with unplanned pregnancies. Ultimately, it should be kept in mind that supporting and empowering women is closely tied to the objective of preventing newborn deaths. Any measures adopted should reflect this principle.

Appendix A

Excerpt from Letter to the Deputy Minister of Social Development sent October 2009

RE: Recommendations in relation to the Protection of Vulnerable Newborn Children

Further to our recent report on the Protection of Vulnerable Newborn Children, forwarded in response to your Minister's request for advice in this matter, we have been asked to provide further advice in relation to recommendation 6 of our report. At pages 10 and 11 of the report, a copy of which is attached, we discuss options to the detainment of expectant mothers as a child protection matter. This practice was struck down by the Supreme Court of Canada in *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.* [1997] 3 SCR 925. We believe it is possible in exigent circumstances to reconcile the protection of a mother's liberty interests with the avoidance of substantial harm to her unborn child.

In the *Winnipeg* decision the majority held that the court's *parens patriae* jurisdiction could not be asserted in favour of the protection of an unborn child. The majority reasoned that to hold as much would constitute a development of the common law that was beyond the court's jurisdiction and that such a development could only come about through legislative action. The majority's finding in *Winnipeg* are clearly summarised in the case headnote as follows:

> The law of Canada does not recognize the unborn child as a legal person possessing rights. This is a general proposition applicable to all aspects of the law. Once a child is born, alive and viable, the law may recognize that its existence began before birth for certain limited purposes. But the only right recognized is that of the born person. Any right or interest the fetus may have remains inchoate and incomplete until the child's birth. It follows that, under the law, the fetus on whose behalf the appellant purported to act in seeking the detention order was not a legal person and possessed no legal rights. There was thus no legal person in whose interests the appellant could act or in whose interests a court order could be made. Putting the matter in terms of tort, there was no right to sue, whether for an injunction or damages, until the child was born alive and viable. Since the action at issue was commenced and the injunctive relief sought before the child's birth, under the law as it presently stands, it must fail.
>
> As well, courts do not have *parens patriae* jurisdiction over unborn children. The power of the court in *parens patriae*, as it stands, does not therefore support an order for the detention and treatment of a pregnant woman for the purpose of preventing harm to the unborn child.

As a general rule, judicial change to common law principles is confined to incremental change based largely on the mechanism of extending an existing principle to new circumstances. Courts will not extend the common law where the revision is major and its ramifications complex. To extend the law of tort to permit an order for the detention and treatment of a pregnant woman for the purpose of preventing harm to the unborn child would require major changes, involving moral choices and conflicts between fundamental interests and rights. Recognition of a fetal action against the mother for lifestyle choices would affect women, who might find themselves incarcerated and treated against their will for conduct alleged to harm the fetus. The proposed changes to the law have complex ramifications impossible for a court to fully assess, giving rise to the danger that the proposed order might impede the goal of healthy infants more than it would promote it. Taken together, the changes to the law of tort that would be required to support the order at issue are of such magnitude, consequence, and difficulty in policy terms that they exceed the proper incremental law-making powers of the courts. These are the sort of changes which should be left to the legislature.

Similarly, to extend the court's *parens patriae* jurisdiction to permit protection of unborn children would require a major change to the law of *parens patriae*. The same problems encountered in relation to extending tort law to the unborn arise in relation to extending the *parens patriae* jurisdiction of the court.. The ramifications of the change would be significant and complex, since such change involves conflicts of fundamental rights and interests and difficult policy issues. A pregnant woman and her unborn child are one and to make orders protecting fetuses would radically impinge on the fundamental liberties of the mother, both as to lifestyle choices and how and as to where she chooses to live and be. The invasion of liberty involved in making court orders affecting the unborn child is far greater than the invasion of liberty involved in court orders relating to born children. In the latter case, the only liberty interest affected is the parent's interest in making decisions for his or her child. By contrast, extension of the *parens patriae* jurisdiction of the court to unborn children has the potential to affect a much broader range of liberty interests since the court cannot make decisions for the unborn child without inevitably making decisions for the mother herself. Such a change would not be an incremental change but a generic change of major impact and consequence. It would seriously intrude on the rights of women. If anything is to be done, the legislature is in a much better position to weigh the competing interests and arrive at a soiution that is principled and minimally intrusive to pregnant women.

In New Brunswick however the *Family Services Act* RSNB 1973, c. F-2.2 provides that unborn children are children in need of protection within the meaning of the Act. Section 1 of the Act defines child as follows:

"child" means a person actually or apparently under the age of majority, unless otherwise specified or prescribed in this Act or the regulations, and includes

*(a)*an unborn child;

*(b)*a stillborn child;

*(c)*a child whose parents are not married to one another;

*(d)*a child to whom a person stands *in loco parentis*, if that person's spouse is a parent of the child; and

*(e)*when used in reference to the relationship between an adopted person and the person adopting or the relationship between a person and his birth mother or birth father, a person who has attained the age of majority;

but, for the purposes of making a determination under Part VII, does not include a person who has been married

This constitutes a distinct legislative choice in New Brunswick which should inform the court's application of the *Winnipeg* decision and the scope of *parens patriae* jurisdiction in this province. For greater certainty however, we submit that this legislative choice should now be confirmed in the interest of protecting unborn and vulnerable newborn children. Denying court remedies to unborn children under the *Judicature Act* RSNB 1973, c.J-2, even though the *Family Services Act* recognizes them as children deserving the same protection as every other child, would be inconsistent, and possibly contrary to the *Charter*.

The *Judicature Act* RSNB 1973, c.J-2, in New Brunswick sets out the role, functions and divisions of superior courts in New Brunswick. Section 11(9) of the Act explicitly confers *parens patriae* jurisdiction on the Family Division of the Court of Queen's Bench. Subsection 11(9) states:

11(9) The Family Division has and may exercise jurisdiction as parens patriae.

This section could be amended to extend the court's inherent jurisdiction in a way which protects the unborn in clear situations of harm while safeguarding the rights of pregnant mothers. The careful balancing of interests required and pointed out in the court's analysis in *Winnipeg* could be achieved by including statutory language that confirms the court's role and authority to act while circumscribing it to cases of substantial harm to the unborn and by limiting the types of orders that may be available in this circumstance.

Legislating in this manner would be a responsible legislative response to the legal vacuum created by the 1996 Supreme Court of Canada decision denying legal personalty to the unborn. The legislator could provide direction to permit the courts to intervene in appropriate cases and charging them with the discerning task of balancing a mother's liberty interests against her child's right to life.

A statutory provision that seeks to address the many concerns outlined above could be added to the *Judicature Act* and resemble the following:

> *11(9) The Family Division has and may exercise jurisdiction as parens patriae.*
>
> ***11(9.1) Notwithstanding the generality of subsection (9), the Family Division may exercise parens patriae jurisdiction over unborn children in circumstances where the mother is carrying the child to term and provided also that***
>
> ***(a) the liberty interests of others are not unreasonably infringed; and***
>
> ***(b) there is a demonstrated substantial risk of significant harm or death to the child at birth.***
>
> ***11(9.2) An order made pursuant to subsection (9.1) may require the mother of an unborn child who is carrying the child to term***
> ***a) to submit to a medical examination to confirm a pregnancy or to verify the health and safety of a child she carries;***
> ***b) to obtain counseling with respect to birth preparation, parenting or adoption services;***
> ***c) to attend regular visits with a child protection social worker, during or following the pregnancy; or***
> ***d) such other measures as the Court deems appropriate to protect the child or the child's mother and as are consistent with the mother's liberty interests, having regard to all the circumstances of the case.***

It may be that legislative provisions of this type are best set out under the *Family Services Act* itself with only a consequential amendment to the *Judicature Act* that would read as:

> ***11(9.1) Notwithstanding the generality of subsection (9), the court may exercise parens patriae jurisdiction over unborn children in accordance with the terms of section ... of the Family Services Act.***

The Supreme Court of Canada essentially in *Winnipeg* tossed the issue of protecting the unborn back at the legislatures for further direction. For the most part Canadian legislatures have

treated the Court's invitation with a very guarded silence. In New Brunswick the decision is a relatively straightforward one since it merely requires the Legislature to confirm an existing legislative choice. Failing to act in this case only further relegates vulnerable newborn and unborn children to the ranks of the disenfranchised.

It is clear from the recent tragic deaths of infants in the province that something can and should be done in clear cases to protect children who are at risk of infanticide. Courts, not legislators are best equipped to deal with discernment and justice with the clash of rights that necessarily arise in such cases. A broad consensus of opinion does exist to allow society and our courts to deal effectively with these matters before deaths occur. It is in that spirit of consensus-seeking and advocacy for the most vulnerable among us that this advice is tendered.